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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 159

MRS. EULA MAY WALTON, ADMINISTRATRIX OF THE ESTATE OF FRED WALTON, DECEASED,

Petitioner,

vs.

SOUTHERN PACKAGE CORPORATION,

Respondent.

BRIEF FOR RESPONDENT.

W. S. HENLEY,
WILLIAM H. WATKINS,
P. H. EAGER, JR.,
MRS. ELIZABETH HULEN,
Attorneys for Respondent.

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1.

The Opinion of the Court Below.

The Supreme Court of the State of Mississippi in Cause No. 35152 therein, entitled "Southern Package Corporation v. Eula May Walton, Administratrix, etc.", by opinion rendered on February 15th, 1943, reported in 11 So. (2d) 912, entered a judgment in said appellate court for the appellant, the employer respondent here, holding that the particular employee involved was not engaged in an "occupation necessary to the production" of goods for interstate commerce. The opinion in said court is set out in the record, pages 5-17.

2.

Statement of the Case.

This case was tried on an agreed statement of facts (R. 1-4).

As appears from said agreed statement of facts, the respondent, the Southern Package Corporation was engaged in the business of manufacturing lumber and veneer products, a substantial portion of which was shipped out of the State of Mississippi. The respondent, therefore, was, under the decisions of this Court, engaged in interstate commerce.

The employee here involved, the original petitioner, was employed in one of the respondent's plants situated in Claiborne County, Mississippi, as a night watchman. This employee, Fred Walton, brought suit in the Circuit Court of Claiborne County, Mississippi for wages, liquidated damages and attorney's fees under Section 207 and Section 216 of the Fair Labor Standards Act of 1938.

The following facts appear in the agreed statement:

> "That the plaintiff's decedent, Fred Walton, was, on the 14th day of August, 1939, an adult resident citizen of Port Gibson, Claiborne County, Mississippi, and on or about said date approached the defendant and sought employment as a night watchman at its Port Gibson plant. That the defendant, thereupon, employed said Fred Walton as a night watchman at said plant. That said plant did not operate at night during the period of the employment of plaintiff's intestate, but did when business required it to operate at night during other periods; and the defendant was not engaged in the actual production of goods for interstate commerce during the period of time that said Fred Walton was on duty. Fires were kept under the boilers in said plant during the night by a fireman on duty for said purpose. Occasionally, repairs were made to the machinery at night by employees other than said Fred Walton. It was the duty of said Walton, as night watchman at said plant, to make an hourly round of the plant and punch a night watchman's clock located at various stations on said plant and to report any fires and trespassers. A record thereof was preserved.

and Walton's services were rendered primarily for the purpose of reducing the fire insurane rates or premiums upon the buildings, machinery, and fixtures situated on said premises. Except for the reduction obtained in said insurance rates, a night watchman would not have been employed, and such services were not necessary nor used in connection with the actual production of veneer or other timber products for shipment in interstate commerce, and said Walton performed no service in connection with the actual manufacturing of veneer or other products."

No suit or claim was filed for the minimum wage and it was agreed that no amount was due under the Fair Labor Standards Act of 1938 for any failure to pay the minimum wage provided for therein. However, it was agreed in the statement of facts "that if said Fred Walton was entitled to receive over-time" as provided for under said act, "that there would have accrued under the provisions of said act" the sum of $400.00 for over-time, of which amount $376.00 accrued in the one year prior to the filing of the suit and the balance of $24.00 accruing within one year from the filing of the original pleading in this cause. The original petitioner thus brought suit for $400.00 and an additional penalty of $400.00 and attorney's fees, under Section 16(b) (Para. 216).

The original petitioner, Fred Walton, died during the pendency of the suit. The present petitioner, Mrs. Eula May Walton, was appointed Administratrix of his estate and revived the suit in her name, over the objection of the respondent.

As stated, the cause was tried entirely on the "Agreed Statement of Facts" and the only facts with reference to the nature of the employment of Fred Walton are those quoted above therefrom. The petitioner recovered a judgment in the trial court for $400.00 plus a penalty of $400.00 and $100.00 attorney's fees, or a total of $900.00. On ap-

peal to the Supreme Court of Mississippi the judgment of the lower court was reversed and judgment was entered in said appellate court for respondent and the suit was dismissed.

3.

Argument.

Summary.

Point A. Fred Walton was not an employee engaged in commerce. Fred Walton was not an employee engaged in the production of goods for commerce, in that he was not employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on goods for commerce and he was not employed "IN ANY PROCESS OR OCCUPATION NECESSARY TO THE PRODUCTION" of goods for commerce. He was, therefore, not entitled to the benefits of the Fair Labor Standards Act of 1938, Title 29 U. S. C. A., Secs. 201-219.

Point B. This is an action for a penalty and is barred by Section 2301, Miss. 1930 Code, requiring that actions for penalties be commenced within one year next after the offense was committed and not after.

Point C. The petitioner here has no cause of action under the Fair Labor Standards Act of 1938, Title 29 U. S. C. A. Sec. 216(b), in that the employee involved is now deceased and the cause of action would not survive said employee.

Point A.

Fred Walton was not an employee engaged in commerce. Fred Walton was not an employee engaged in the production of goods for commerce, in that he was not employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on goods for commerce and he was not employed "in any process or occupation neces-

sary to the production'' of goods for commerce. He was, therefore, not entitled to the benefits of the Fair Labor Standards Act of 1938, Title 29 U. S. C. A., Sections 201-219.

The portion of the Fair Labor Standards Act of 1938 under which recovery is sought is Section 207 of 29 U. S. C. A., which provides as follows:

> ''Sec. 207. Maximum Hours
>
> ''(a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce——''

By Sec. 203(j) of 29 U. S. C. A., an employee who is engaged in the production of goods for commerce is defined as follows:

> ''(j) 'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this chapter an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other maner working on such goods, or in any process or occupation necessary to the production thereof, in any State.''

A cause of action is granted to such an employee if the employer violates Sec. 207 of 29 U. S. C. A. in Sec. 216 of 29 U. S. C. A. as follows:

> ''(b) Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. * * * ''

It is admitted that Fred Walton was not himself engaged in the production of goods for commerce save and unless he can be said to have been engaged in an "occupation *necessary* to the production" of goods for commerce. It is admitted and quite evident that Fred Walton while serving as night watchman for the respondent was not himself engaged in the production, manufacture, mining, handling or transporting of any goods for commerce. The only possibility of the services of Walton coming within the terms of the act is under that part of the act including employees engaged in any occupation "necessary to the production" of goods for commerce.

The specific question before this Court, therefore, on the agreed and admitted facts in this case is: Was Fred Walton while acting as a night watchman proved to have been engaged in an occupation necessary to the production of lumber and veneer products by the respondent?

We respectfully submit that a decision of this case is not controlled by *Kirschbaum* v. *Walling*, 316 U. S. 517, 86 L. Ed. 1638. Petitioner relies principally upon this case, and in the Supreme Court of the State of Mississippi Chief Justice Smith dissented upon the ground that this decision was controlling. Any and all general principles announced in that decision are, of course, controlling here. However, in that opinion itself this Court recognized the fact that the applicability of the Fair Labor Standards Act to any particular employee is a separate and distinct fact to be decided upon the evidence introduced with reference to the nature of the employment in the particular case. In other words, each case must be decided with reference to the particular duties of the employee involved as developed or shown by the facts in the specific record before the court. In that opinion this Court said:

> "'The criterion is necessarily one of degree and must be so defined. This does not satisfy those who

seek for mathematical or rigid formulas. * * *" Santa Cruz Fruit Packing Co. v. National Labor Relations Board, 303 U. S. 453, 467, 82 L. Ed. 954, 960, 58 Sup. Ct. 656. 'What is needed is something of that common sense accommodation of judgment to kaleidoscopic situations which characterize the law in its treatment of problems of causation. Gully v. First National Bank, 299 U. S. 109, 117, 81 L. Ed. 70, 74, 57 Sup. Ct. 96.' "

As was said in *Delaware etc. R. R. Co.* v. *Scales* (C. C. A. 2), 18 F. (2d) 73, in holding that a private police officer employed by a railroad engaged in interstate commerce, whose duties were to arrest offenders and who had nothing to do with transportation, was not engaged in interstate commerce so as to come under the Employer's Liability Act:

"* * * 'Each case is made to stand on its own bottom, by asking the question whether, at the time of injury, the employee was engaged in work closely connected with interstate transportation as practically to be part of it?' If the answer in any particular set of facts is 'Yes', then the act covers that employee's case. Southern, etc., Co. v. Industrial, 251 U. S. 259, 40 S. Ct. 130, 64 L. Ed. 258, 10 A. L. R. 1181; Erie Railroad v. Collins, 253 U. S. 77, 40 S. Ct. 450, 64 L. Ed. 790, affirming (C. C. A.) 259 F. 172.

"This method of ascertaining jurisdiction renders particular cases of rather small value, for almost no set of circumstances is exactly like the next phenomenon. * * *"

In other words, the Fair Labor Standards Act does not attempt to enumerate and this Court has not attempted to enumerate exactly what occupations are always necessary to production of goods for commerce. That question is left to be determined upon the facts of the individual cases as they arise. *Santa Cruz Fruit Packing Co.* v. *Na-*

tional Labor Relations Board, supra; Consolidated Edison Co. v. National Labor Relations Board, 305 U. S. 197, 83 L. Ed. 126, 59 S. Ct. 206.

This Court did not attempt to hold in *Kirschbaum v. Walling, supra*, that every night watchman at a plant producing goods for commerce was engaged in an occupation necessary to the production of the goods. No more did Your Honors in that opinion decide that every electrician, elevator operator, porter, etc. working in a business where goods for commerce are produced was engaged in an occupation necessary to the production of those goods for commerce.

In the case of *Kirschbaum v. Walling, supra*, two things and two things only were actually decided: First, that employees of an independent contractor, not itself engaged in commerce or in the production of goods for commerce, can themselves be engaged in an occupation necessary to the production of goods for commerce; and, two, that under the facts in that case the actual employees involved were performing services necessary to the production of goods in commerce.

In fact, the principal decision of that case was the first question stated above. That was the question to which most of the briefs were directed. It was rather assumed that if the employees of the owners of the building could be said to be engaged in an occupation necessary to the production of goods for commerce, that then these employees there involved were so engaged. Unquestionably, the engineers and electricians and elevator operators were engaged in an occupation necessary to the production of goods in commerce if any employee of the owners of the building could be so classed. No distinction was drawn there between the various employees and apparently no argument was made that some of the employees might be so classed and others not. It was apparently taken for granted that

all of the employees there were performing duties necessary to the effective maintenance of a loft building. Therefore, if being engaged in the effective maintenance of the loft building was being engaged in an occupation necessary for the production of goods in commerce, then these employees as a group all came within the act.

The opinion in *Kirschbaum* v. *Walling*, *supra*, is a decision of two separate cases: *Arsenal Building Corp.* v. *Walling*, Case No. 924, the decision in the lower court being reported in 125 F. (2d) 297, and *Fleming* v. *A. B. Kirschbaum Co.*, Case No. 910, the opinion of the lower court appearing in 124 F. (2d) 967 and 38 F. Supp. 204.

In the *Arsenal Building Corporation* case, the record indicates that there was no watchman involved at all. We have carefully read the case as reported from the district court, as well as the Circuit Court of Appeals, and no statement is made that any of the employees involved were watchmen. It will, also, be observed that in the *Fleming* case, where watchmen were involved, that the duties of these watchmen were not limited to the usual duties of a watchman, but that the watchman also had responsibility with reference to the maintenance of the building. This Court, in stating the activities of the employees involved, used the following language:

> "These employees perform the customary duties of persons charged with the effective maintenance of a loft building. The engineer and the firemen produce heat, hot water, and steam necessary to the manufacturing operations. They keep elevators, radiators, and fire sprinkler systems in repair. The electrician maintains the system which furnishes the tenants with light and power. The elevator operators run both the freight elevators which start and finish the interstate journeys of goods going from and coming to the tenants, and the passenger elevators which carry employees, customers, salesmen and visitors. *The watch-*

men protect the buildings from fire and theft. The carpenters repair the halls and stairways and other parts of the buildings commonly used by the tenants. The porters keep the buildings clean and habitable.

* * * * * * *

"As part of the consideration for the rent, the defendant furnishes the services of three elevator operators, two watchmen, three firemen, an engineer, a carpenter and a carpenter's helper, and a porter or cleaner, all of whom are employed and paid by it. It also employs a cashier and bookkeeper who are not involved in this proceeding. The elevator operators carry both passengers and freight in varying ratios between the several floors of the building. *The watchmen pass through the building, closing windows, putting out lights, guarding against fires, etc.* The engineer supervises the operation of the boilers, which produce steam used by some of the tenants in their manufacturing operations, the various pumps in the building, and the production of direct electric current which is used to light the building and is also used by two of the tenants; he also keeps the elevators in proper working order and takes care of the sprinkler tank. The firemen fire the boilers and occasionally supervise the running of the pumps when the engineer is called to another part of the building. The carpenter replaces sash chains, repairs the doors of the building and paints the common hallways, stair-cases, etc."

The Supreme Court of Mississippi in its opinion called attention to the fact that in every reported case where a watchman was held within the act, such employee was charged with some additional duty of sufficient importance to bring the employee within the statute. And while the Court in its opinion in the *Kirschbaum* case does not expressly so state, the Court must have been impressed with the fact that the record there disclosed that the watchman had other responsible duties. Not only that but these cases

presented a very different state of facts from the facts shown in this record. There we have two buildings in urban communities, in which the lessees were manufacturing merchandise calculated to attract thieves and thefts. They were situated in large cities, surrounded by organized crime, for which reason doubtless the lessee required the lessor to provide a watchman. It appears that the operations continued there at night, that divers and sundry persons were going in the buildings at all times and the merchandise was exposed to theft and fire.

In the present case we have a wood-working plant in a small suburban community manufacturing commodities not at all attractive to theft. The watchman was only on duty at night. The plant was not under operation at all at that time. The duty of the watchman was merely to walk through the building every hour during the night and make record of the fact that he had done so by registering in the appliance provided for that purpose, in his routine travels through the building, and report fire or trespassers. He was charged with no other duty in respect to fire and trespassers. Upon making his rounds through the building, which he was required to do each hour, he then had no other duties to perform, and he could retire, relax, or do anything he pleased, go to sleep, if he felt like it. In other words, his duties were that of a watchman with the most limited authority and responsibility.

We respectfully submit that this Court by holding the watchmen, under the facts and circumstances reflected by the record in *Kirschbaum* v. *Walling*, *supra*, were engaged in an occupation necessary to the production of goods in commerce, did not hold that all watchmen in plants producing goods in commerce had identical duties and all such watchmen as a class would necessarily come under the Fair Labor Standards Act.

As we have stated, under the facts in *Kirschbaum* v.

Walling, the elevator operators were patently engaged in an occupation necessary to the production of goods in commerce, if employees of the owners of the building charged with the duty of the effective maintenance of the loft building were ever engaged in an occupation necessary to the production of goods in commerce. In that case the tenants could not have used the building without the elevator service. A very different situation would arise, for example, in a building of only two stories, of a type easily and customarily used by tenants engaged in commerce without elevator service but where an elevator had been installed and was operated by the owner of the building for reasons personal to himself, although the elevator, being available, was actually used at times by the tenants.

We are, therefore, upon this appeal, presenting to Your Honors for determination a question not decided by *Kirschbaum* v. *Walling, supra*. The question before this Court at this time is whether *under the facts presented by this record*, Fred Walton, while acting as a night watchman for respondent, was as a question of law, on admitted facts, engaged in an occupation necessary to the production of goods for commerce.

The fact that the employer here, the respondent, was engaged in commerce does not, of course, affect a decision of this question. That the Fair Labor Standards Act does not cover every employee of an employer engaged in commerce is clearly stated in *Kirschbaum* vs. *Walling, supra*.

This proposition was correctly stated in the opinion by the Supreme Court of Mississippi in this case as follows:

> "In the case of Abadie v. Cudahy Packing Co., 35 Fed. Supp. 164, the Court was dealing with a situation where a bookkeeper or ledger clerk was claiming the benefits of the Act, and Judge Borah, in rendering the opinion, said: 'Even if it could be said that defendant was engaged in the production of goods for

commerce because it 'handled or in any other manner worked on' the goods sold in interstate commerce it would not follow that plaintiff was employed in an occupation necessary to the production thereof as there is no casual relationship between his occupation and production. Plaintiff's occupation may have been necessary in respect to defendant's business but his duties as ledger clerk were not so closely related to production as can be considered necessary thereto.'

"The legislative history mentioned in Jewel Tea Co. *v.* Williams, supra, relating to the enactment of the Fair Labor Standards Act discloses that the conference draft of the bill, which was finally enacted into law after the Senate had refused to accede to the House amendment, which broadened the coverage of the bill by requiring time and a half for overtime for all employees of an 'employer engaged in commerce in an industry affecting commerce,' restored the test of coverage contained in the original Senate bill, and that Senator Pepper, of Florida, a member of the Conference Committee which prepared the Act as adopted, said, in answer to an objection to the broad scope of the Act, 'I want it distinctly stated that this proposed law is not applicable to all employees of an industry which itself is engaged in interstate commerce. It is applicable only to (fol. 68) those employees who themselves are engaged either in interstate commerce, or the production of goods for interstate commerce, and the contrary theory was definitely rejected by the Committee.' 83 C. R. 9168 (Senate—75th Cong. 3rd Sess., June 14, 1938); also, Jax Beer Co. *v.* Redfern, 124 Fed. (2d) 172."

Therefore, again may we state to the court that the only question for determination on this appeal is whether under the agreed statement of facts here involved, the employee Fred Walton was proved to be actually engaged in an occupation "*necessary* to the production" of goods in commerce?

The case of *Kirschbaum* v. *Walling*, *supra* did determine

the applicable general definition of the word "necessary" in the act. The word "necessary" has been defined by courts construing specific statutes and instruments as having every possible shade of meaning between "useful" or "helpful" on the one hand and "indispensible" on the other hand. See Words & Phrases, "necessary". The Supreme Court of the State of Mississippi in its opinion quoted the Webster's Dictionary definition as follows:

> "Essential to a desirable or projected end or condition; not to be dispensed with without loss, damage, inefficiency or the like; as, a necessary to."

Petitioner in her brief herein insists upon the applicability of the definition in *McCulloch* v. *Maryland*, 4 Wheat, 315, 413, as follows:

> "To employ the means necessary to an end, is generally understood as employing any means calculated to produce the end, and as being confined to those singular means, without which the end would be entirely unattainable."

This definition was applied only to an interpretation of the power granted to Congress by the Constitution to enact all laws which were necessary and proper for carrying into execution the enumerated powers conferred on the government. This broad definition of "necessary" is usually applied in the interpretation of powers (for example: powers of a corporation or officers). It is rarely otherwise applied. See Words & Phrases, "Necessary".

Most courts in interpreting the word "necessary" in the Fair Labor Standards Act have refused to apply the liberal definition of "beneficial", and have not gone so far as to define it as "indispensible", but have held that the word "necessary" therein should be defined as "essential". See *S. H. Robinson Co.* v. *Larue* (Tenn.), 156 S. W. (2d) 359; *Lorenzetti* v. *American Trust Co.*, 45 F. Supp. 128. This Court in *Kirschbaum* v. *Walling* adopted the definition of

"necessary" as "essential", holding that an employee was engaged in an occupation necessary to the production of goods for commerce when his duties were an essential part of the process for production for commerce. This Court used the following language:

> "* * * In our judgment, the work of the employees in these cases had such a *close and immediate tie* with the process of production for commerce, and was therefore so much an *essential* part of it, that the employees are to be regarded as engaged in an occupation 'necessary to the production of goods for commerce' * * *"

That, we submit, is the test applicable here. Was Fred Walton, under the facts in this case, performing the work that had such a close and immediate tie with the process of production that his work was an essential part of the production of goods for commerce? We respectfully submit that the work of Fred Walton as reflected by the agreed statement of facts here had no close or immediate tie with the process of manufacturing lumber and was not essential to or an essential part of the manufacture of the lumber and veneer. In fact, the petitioner in the agreed statement of facts has admitted as much. Fred Walton not only had no duties whatsoever beyond making an hourly round of the plant and reporting fires and trespassers, but it is admitted that he was not essential to the production of the lumber; that a night watchman was employed only for the purpose of reducing somewhat the amount of the fire insurance premium, in accordance with the general practice of fire insurance companies; that except for this one reason no night watchman would have been employed. We call Your Honors' attention again to the fact that petitioner has agreed that:

> "Walton's services were rendered primarly for the purpose of reducing the fire insurance rates or pre-

miums upon the buildings, machinery and fixtures situated on the premises. *Except for the reduction obtained in said insurance rates, a night watchman would not have been employed.*"

We call Your Honors' attention to the fact that petitioner here has agreed that Walton's services:

> "WERE NOT NECESSARY NOR USED IN CONNECTION WITH THE ACTUAL PRODUCTION OF VENEER OR OTHER TIMBER PRODUCTS for shipment in interstate commerce, and said Walton performed no service in connection with the actual manufacture of veneer or other production."

Thus, we respectfully submit that the petitioner has agreed that the work of Walton was not an essential part of the production of lumber or veneer.

We can readily understand that in many plants engaged in the production of goods for commerce a night watchman would be essential. This would depend upon the nature and kind of production, the type of plant, etc. Here, it is not only agreed that the employer did not need a watchman at this particular plant and only hired one to save money on insurance premiums, but no facts whatsoever are present in the record which would show or tend to show that this particular plant of respondent needed the services of a night watchman. Petitioner throughout her brief has stated that the duties of Walton were "to guard and protect respondent's plant." There is no justification for such a statement in the agreed statement of facts. There is not one iota of evidence before this Court that respondent's plant was of such a type or nature that it needed guarding and protecting by a night watchman. On the other hand there is the agreement to the contrary. Upon this question, the Supreme Court of Mississippi, in its opinion in this case said:

> "However, a recovery has been allowed in other cases on the ground that it was the duty of the night watch-

man to guard the materials, intended for interstate commerce, while stored on the yard, and when loaded in freight cars or otherwise awaiting shipment. S. H. Robinson & Co. v. LaRue, Tenn. 1941, 156 S. W. (2d) 432, affirming 156 S. W. 359. But none of the cases, supra, are controlling in the instant case, because the agreed statement of facts is entirely silent as to whether the duties of the employee, Fred Walton, related to guarding and protecting any goods assembled for manufacture or awaiting shipment in interstate commerce at the plant in question. Since it is agreed that he was employed only to enable the employer to obtain reduced insurance rates or premiums 'upon the building, machinery, and fixtures situated on said premises' we must assume, for the purpose of this decision, that his duties did not involve the guarding and protecting of the goods for shipment in interstate commerce, as we are not warranted in enlarging upon the agreed statement of facts so as to include a factor not covered by such agreement."

The burden of proof was upon the petitioner here to prove that Fred Walton while acting as night watchman was engaged in an occupation necessary or essential to the production of the lumber and veneer. *Warren-Bradshaw Drilling Co.* v. *O. V. Hall*, 87 L. Ed. (Adv. Sheet) pg. 99, 317 U. S. ——; *Rogers* v. *Glazer*, 32 F. Supp. 990; *Baggett* v. *Henry-Fisher Packing Co.*, 37 F. Supp. 670; *New Amsterdam Cas. Co.* v. *State Industrial Comm.* (Okla.) 193 Pac. 974.

Therefore, if the services of a night watchman were essential to the successful operation of respondent's veneer plant, the burden was upon the petitioner to so prove. The record is entirely silent as to whether or not the buildings were of such type as to make the possibility of fire a hazard reasonably requiring the employment of a night watchman. The record is entirely silent as to whether or not there was in and about respondent's plant any substantial amount of products, tools, equipment, etc. as to make the employment of a night watchman reasonably essential to prevent

theft. The type of production produced, i. e., lumber and veneer would not lend itself to theft. The record is entirely silent as to whether or not any sizable amount of products were kept or assembled in and about the plant so as to make reasonably essential the employment of a night watchman. Lumber and veneer will, of course, burn but the record is entirely silent as to whether or not there was ever any sizable amount of these products kept in and about the plant. For all that can be told from this record respondent's plant may have been practically fire-proof. As far as can be told from this record, there were usually and customarily no fire or theft hazards in and about respondent's plant, making essential the services of a night watchman to guard and protect the plant. The burden of proof to so prove was upon petitioner. Petitioner has entirely failed in sustaining this burden and in addition to the absolute failure on the part of petitioner to prove that the services of a night watchman were essential or even beneficial to the production of the lumber or veneer, there is the agreement that a night watchman would not have been employed except to reduce fire insurance premiums and that the services of a night watchman were not necessary to the actual production of the timber products.

As we have stated, we are quite ready to agree that the services of a night watchman are necessary for the operation of many concerns engaged in the production of goods for commerce. We, also, submit that in many businesses engaged in the production of goods for commerce the services of a night watchman are not essential. We are therefore not surprised to find that there are many cases involving the applicability of the Fair Labor Standards Act to night watchman holding that the particular night watchman there involved came under the provisions of the act and, also, at the same time many cases holding that the duties of the particular watchman involved and the ne-

cessity for the watchman would not bring him within the act.

This Court has held that cases under the Federal Employer's Liability Act are applicable and in point in a construction of the Fair Labor Standards Act. *McLeod* v. *Threlkeld*, decided Oct. 19, 1942, 87 L. Ed. (Adv. Sheet) 1154; *Overstreet* v. *North Shore Corp.*, decided Feb. 1st, 1943, 87 L. Ed. (Adv. Sheet) 423.

In cases interpreting the Federal Employer's Liability Act and in determining whether or not a particular employee came within the act we also find some to the effect that certain particular watchmen with certain definite duties were within the act and others holding that other watchmen with other duties and under other circumstances were not within the act. The cases are not in conflict. The test was whether or not the individual night watchman involved in that particular case was performing duties sufficiently intimately connected with and essential to the interstate commerce activity as that they themselves could be said to be engaged in interstate commerce. For cases holding night watchmen at plants and employed by businesses engaged in interstate commerce were not within the Federal Employer's Liability Act, see *New York Central R. R. Co.* v. *White*, 243 U. S. 188, 61 L. Ed. 667, 37 S. Ct. Rep. 247; *Feaster* v. *Southern Railway Co.* (C. C. A. 4), 15 F. (2d) 540; *Delaware, etc., Ry. Co.* v. *Scales* (C. C. A. 2), 18 F. (2d 73; *Southern Railway Co.* v. *Varnell* (Ala.), 131 So. 803, Writ of Cert. denied 283 U. S. 852, 75 L. Ed. 1460, 51 Sup. Ct. 561; *Hardy* v. *Atl., etc., Ry. Co.* (Ga.), 93 S. E. 18; *Wabash etc., R. Co.* v. *Industrial Comm.* (Ill.), 121 N. E. 569.

Turning to cases deciding the applicability of the Fair Labor Standards Act to night watchmen, we find that in practically every reported case where a watchman was held to be within the act, such employee was charged with additional duties beyond those performed by the one Walton

here of such importance as to make the watchman's services reasonably essential to the production of goods in commerce. The Supreme Court of the State of Mississippi in its opinion in this case discussed this question as follows:

"It was also agreed that the plant did not operate at night during the period of Walton's employment, and that the defendant corporation was not engaged at night in the production of goods for interstate commerce while he was on duty; that when fires were kept under the boilers in said plant at night, it was done by a fireman kept on duty for that purpose, and that when repairs were made occasionally at night to the machinery, such work was done by employees other than the said Walton—a stipulation which distinguishes the case from that of Hart *v.* Gregory, 218 N. C. 184, 10 S. E. (2d) 644, 130 A. L. R. 265, wherein the court allowed recovery under the Act by a night watchman who was required to pump the boilers up at night to keep the water in them as long as the steam was up so they would not get dry, and where the Court said: 'The present case we think comes within the provisions of the Fair Labor Standards Act, as the duties of this night watchman were more than ordinarily required of one so termed. The duty of plaintiff was to keep water in the boiler so that in the morning steam could easily be available. If the boilers were not kept filled up at night, they would have burned dry and that would have ruined them and made them unfit for use" (R. 7-8).

* * * * * * *

"It was held in the case of Hart *v.* Gregory, supra, as heretofore indicated that a night watchman whose duties also include the pumping of water into boilers, so that they will not burn dry and be ruined, but will be fit for service when production starts the next day, is engaged in an '*occupation necessary to the* production' of goods within the meaning of the Act here under consideration. In the course of its opinion, the Court

made the observation, italicizing its language, that 'it was necessary to have those boilers filled up with water and if they had not been kept filled up at night they would have burned dry and that would have ruined the boilers.' The decision discloses that the turning point in the case entitling the night watchman to the benefits of the Act was the fact that he had these other duties to perform in addition to his regular duties as a night watchman. After this case was remanded it was again tried, and on conflicting evidence the question was submitted to the jury as to whether the night watchman actually performed the services other than nightwatching, as claimed and the jury decided this issue in the negative, and upon the second appeal the judgment denying liability was affirmed. 220 N. C. 180, 16 S. E. (2d) 835; Vol. 1, Wage & Hour Cases, 1172. * * *" (R. 9-10).

While it is true that there are a few cases holding a night watchman within the terms of the Fair Labor Standards Act where no great emphasis is placed upon any duties upon the night watchman save to "*protect and guard*" the goods or plant of the employer, in each of these cases it affirmatively appears that there was need for a night watchman to protect and guard the products and that the services of the night watchman were, therefore, essential to the protection of goods in commerce. In the *Kirschbaum* Case, *supra*, this Court affirmatively stated that the maintenance of a safe, habitable building was indispensable to the production of goods in interstate commerce and that the services of the employees there were essential for the maintenance of a safe, habitable building. There, the services of a night watchman were shown to be an essential part of the maintenance of a safe building. Here, this has not been proved. All of the authorities relied upon by petitioner holding that a night watchman came under the terms of the Fair Labor Standards Act can be distinguished upon

the ground that either (1) the night watchman involved had additional duties closely connected with the actual production of goods for commerce, or (2) that the services of a night watchman in that particular business were proved to be essential for the guarding and preservation of the plant or products.

We refer Your Honors to the case of *Rogers* v. *Glazer* (D. C. Mo.), 32 F. Supp. 900. In that case the employee was a watchman in a business engaged in buying old automobiles which were dismantled, the parts being sold and the scrap metal being sold and passing into interstate commerce. The court indicated that some employees of this business, depending upon the nature of their duties, might be considered as engaged in an occupation necessary to the production of goods for commerce, but Judge Otis in holding that the watchman had not been proved to be essential to the successful carrying on of the business said:

> "Our question then comes down to this question: Was the plaintiff an employee who was engaged in the production of goods for commerce? Well, now, he certainly was not engaged in the production of goods in the literal sense of the word production. Nobody has contended he was. He was a watchman. It was his business to protect from depredations by thieves this business enterprise and the property of the defendants on the site of the place of business. I think it can be truly said from the evidence that the only property that had any real value, which needed any protection from thieves, was the parts which the defendants were engaged in selling. The scrap that remained when the parts were removed from automobiles which has been bought, in the first place was of comparatively small value, and in the second place, it was extremely difficult for thieves to carry it away.

"I do not think that it can be said that a watchman for such an establishment as the defendants maintain, a part of whose duty it may be said—a very small part of whose duty was to watch the pile of scrap iron on the premises, I do not think that it can be said that he is engaged in an occupation *necessary* to the production of goods. Perhaps I may be giving too literal an interpretation to the word "necessary". Certainly it is not *necessary* to the production of goods that there should be a watchman at all. In many yards scrap is assembled and sold without any watchman and I do not think that it can be said that a watchman *produces* goods. He may do that which is helpful to the business, he may help to produce the profits that arise from the business. He does not produce the goods. I do not think I could make my position clearer on that if I were talk an hour about it."

The drilling of oil wells for production of oil which goes into interstate commerce has been held to be a business involving commerce. In *Brown* v. *Carter Drilling Co.* (D. C. Tex), 38 F. Supp. 489, the court held that a particular watchman employed by a drilling company was not such an employee whose services were essential to the production of goods in commerce. The court used the following language:

"Plaintiff insists that the Fair Labor Standards Act of 1938 should be liberally construed. An Act of Congress which prohibits the making of contracts of employment between an employer and employee, except in accordance with such Act, and which imposes heavy and severe penalties in the way of damages on the employer for violation of such Act, and permits the employee to have and recover such penalties, it may be should be liberally construed, but I doubt it. Certainly the evidence offered by an employee such as is plaintiff who has long since received and accepted without protest the pay called for in his contract of employment, and who after long delay, and without

any reasonable explanation of the delay, sues to recover compensation for overtime and penalties, should be convincing, both as to whether such employee is working in commerce and as to the terms of his employment.

"• • • Plaintiff was not employed to help in drilling of wells, nor as a watchman during the drilling of wells, nor as a watchman on a productive well, but only as a watchman on an idle drilling rig, or part of an idle drilling rig, between the time defendant finished drilling one well until he was able to find a customer and make a contract to drill, and begin drilling, another well. I am convinced that it was not the intention of Congress to bring an employee such as was plaintiff under the provisions of the Act." • • •

We call Your Honors' attention to *Jewel Tea Co.* v. *Williams* (C. C. A. 10) 118 F. (2d) 202, holding that the act "does not extend to employment that merely affects interstate commerce." And to the same effect is a case of *Chapman* v. *Home Ice Co.* (D. C.), 43 F. Supp. 424, holding the act does not apply to employees whose duties merely "affect interstate commerce."

We, also, call Your Honors' attention to the following cases: *Hart* v. *Gregory*, 220 N. C. 180, 16 S. E. 837; *Rogers* v. *Glazer*, 32 Fed. Supp. 990; *Brown* v. *Bailey*, 177 Tenn. 185, 145 S. W. 2d 105; *Brown* v. *Carter Drilling Co.*, 38 F. Supp. 489; *Dotson* v. *Stowers*, 37 Fed. Supp. 937; *Bowman* v. *Pace Company*, 119 F. 2d 858.

We respectfully submit that petitioner here has not sustained her burden of proving that the services of Walton here had, in the language of this Court, "such a close and immediate tie with the process of production for commerce, and was, therefore, so much an essential part of it"; that he could be regarded as being engaged in an occupation "necessary to the production of goods for commerce."

Congress has used the word "necessary," and we submit that the terms "convenient," "desirable," or even "customary," should not be substituted for the language used by Congress. We submit that in the case of *Kirschbaum v. Walling, supra*, the Court extended the act of interpretation to the utmost confines, and that the Court will not further broaden the act by its interpretation so as to include employees whose services are at the utmost desirable and convenient, and also convenient and desirable for a purpose entirely disconnected from the production of goods for commerce.

We, therefore, respectfully submit that this case should be affirmed by this Court.

Point B.

This is an action for a penalty and is barred by Section 2301, Miss. 1930 Code, requiring that actions for penalties be commenced within one year next after the offense was committed and not after.

It is well settled that this action would be controlled by the applicable statute of limitation of the State of Mississippi. See *Wilkinson v. Swift & Co.* (U. S. D. C. N. Texas, 1941), Vol. 1, Wage and Hour Cases, 604; *Cline v. Super-Cold S. W. Co.* (U. S. D. C. N. Texas, 1941), 1 W. H. Cases, 777; *Klotz v. Ippolito* (U. S. D. C. S. Texas, 1941), 40 Fed. Supp. 422; *Littleton v. White Motor Company* (U. S. D. C. N. Texas, 1941), 1 W. H. Cases 914; *Duncan v. Montgomery Ward & Co., Inc.* (U. S. D. C. S. Texas, 1941), 42 Fed. Supp. 879; *Owen v. Liquid Carbonic Corporation* (U. S. D. C. S. Texas, 1941), 42 Fed. Supp. 774; *Collins v. Hancock* (La. First Judicial District Court, 1941), 1 W. H. Cases 1117.

Petitioner in her brief does not question this principal of law and, therefore, it stands admitted that any statute

of the State of Mississippi prescribing limitations upon the bringing of such an action would control.

The Mississippi statute applicable is Section 2301, which reads as follows:

> "2301. Action for penalty commenced in one year.—All actions and suits for any penalty or forfeiture on any penal statute, brought by any person to whom the penalty or forfeiture is given, in whole or in part, shall be commenced within one year next after the offense was committed and not after."

The most recent construction of this statute is that of *State for Use of Rogers v. Newton*, 191 Miss. 611, 3 So. (2d) 816. This case involved Section 14 of Chap. 255 of the Laws of 1936, providing that if any County superintendent of education issued certificates illegally or in excess of the amount of the budget provisions, that the County superintendent and his bondsmen were liable to the holders of such certificates for the face value thereof. The Court, speaking through Chief Justice Smith, said in part:

> "On a former appeal herein, National Surety Corporation et al. *v.* State for Use of Rogers, 189 Miss. 540, 198 So. 299, 302, one of the questions presented was whether Mrs. Rogers had the right to sue on the certificates. The appellant's contention there was that the liability imposed by the statute is a penalty and therefore the right to recover it is not assignable. The court held that it is a penalty and not assignable under the general law, but that the statute itself confers the right upon any holder of any such pay certificates to sue thereon. This liability imposed by the statute was there referred to five separate times as a 'penalty'. On return of the case to the court below, the appellees plead the limitation of Section 2301, Code of 1930, which provides that:
>
> " 'All actions and suits for any penalty or forfeiture on any penal statute, brought by any person to whom

the penalty or forfeiture is given, in whole or in part, shall be commenced within one year next after the offense was committed, and not after.'

"The Court, as it should have done, followed our former opinion and held that the liability here imposed on the superintendent to be a penalty, and, therefore, as more than a year had elapsed since the cause of action accrued, it was barred by limitation.

"Leaving out of view the law of the case rule and expressing no opinion as to its applicability vel non here, the question presented is whether this Court should now depart from its holding on the former appeal herein and hold this liability not to be a penalty. We shall assume, though the fact may be otherwise, that the words 'penalty' and 'forfeiture' are used in Section 2301, Code of 1930, as being synonymous and interchangeable.

"In our opinion on the former appeal herein, to which we adhere, it was said that 'this statute is highly penal'. An examination of the statute discloses that this is in accord with the legislative intent. Its sanctions are designated as penalties in its title, which sets forth that its purpose, among other things, is 'to regulate the expenditure of school funds in the several counties and separate school districts; to restrict the amount of such expenditures to amount of revenue available thereof; and to provide penalties for violations of the provisions of this act.' Two penalties are imposed by Section 14 of the Act on County superintendents of education to punish them for, and to deter them from, violating the Section: '(1) Payment of the face value of pay certificates wrongfully issued; and (2) fine and imprisonment or both for the violation of any of the provisions of the section. That the first is not payable to the State, but to the holder of the certificate does not take it out of the penal category. Bank of Hickory v. May, 119 Miss. 239, 80 So. 704; 59 C. J. 11; 25 C. J. 1149, 1178. This fact is recognized by Section 2301 of the Code hereinbefore set out, which applied only to penalties and forfeitures payable to

individuals. But, it is said that this provision of the statute is remedial and not penal. The title of the statute, in this connection, refers only to penalties and does not remotely indicate that any of its provisions are simply remedial. But that aside, a remedial statute is one that cures defects in, or enlarges or abridges the scope of, a former law. 1 Blackstone's Com. 86; 59 C. J. 1106; 25 R. C. 765. E.G., a statute that grants a theretofore non-existent remedy for a wrong inflicted. Metzger et al. v. Joseph, 111 Miss. 385, 71 So. 645. *A statute that makes a wrong-doer liable to the person wronged for a fixed sum without reference to the damage inflicted by the commission of the wrong is penal.* Bank of Hickory v. May, supra; Gulf & S. I. R. Co. v. Laurel, etc., Co., 172 Miss. 630, 158 So. 778; 159 So. 838; 160 So. 564; O'Sullivan v. Felix, 233 U. S. 318, 34 S. Ct. 596, 58 L. Ed. 980; 25 C. J. 1178, Sec. 72.

"When tested by these rules, it will appear that this provision of Section 14, Chapter 255, Laws of 1936, is not remedial but imposes a penalty.

"* * * The liability imposed is not for wrongfully employing a teacher or carrier, but for issuing to him a pay certificate without the issuance of which the statute imposes no liability on the superintendent to the teacher or carrier. *Bearing in mind that the issuance of this certificate of itself inflicts no injury on the school teacher or carrier, it will readily be seen that the liability here imposed is for a fixed sum to be paid whether injury has been inflicted or not on the teacher or carrier by the issuance of the pay certificate, or on any holder thereof.*"

Similarly, here, it is admitted that the failure to pay overtime to Walton inflicted no injury on Walton. There appears in the agreed statement of facts (R. 2-3) the following:

"(3) That during the period of time that Fred Walton was employed by the defendant, he was paid for his services the amount that defendant contracted

to pay him, which amount is agreed upon as the actual value of said services.

"(4) That the defendant's witnesses if present in Court would testify that the amount that Fred Walton was paid for his services was more than said Fred Walton could have obtained from any other employment during the period of time that he was employed by the defendant, and that the attorney of said plaintiff has no way of disproving said testimony, but object to the same on the ground that such testimony is inadmissable. * * *

* * * * * * *

"(7) That the defendant could have employed more than one person to perform said services at the same rate of pay per hour as was paid to said Fred Walton, and no overtime would have accrued, and that the defendant has in no wise profited by the use of one employee as a night watchman instead of dividing said employment among two employees. If Fred Walton had not accepted his pay without protest, defendant would have employed two night watchmen and no overtime would have accrued. That Fred Walton requested said employment with full knowledge of his pay and of the hours of employment and accepted his pay at the rate agreed upon and did not complain or protest at his rate of pay nor the hours worked during the period of his employment nor afterwards prior to the filing of the suit."

There is thus imposed by this statute a liability to the employee for a fixed sum to be paid whether injury was inflicted or not.

Also, in this connection, we call the court's attention to the fact that the very heading adopted by Congress for Section 216, is "Penalty; Civil and Criminal Liability".

Counsel for plaintiff have cited quite a few cases in which it is contended that the courts have decided that the civil

provisions of Section 216 are not penalties. However, these cases are based upon the question of the jurisdiction of the court and more especially as to whether a state court would have jurisdiction. Congress had previously reserved jurisdiction to the Federal Court of all cases to enforce federal penalties, 28 U. S. C. A., Secs. 780 and 788. By specifically providing in Sec. 216 of 29 U. S. C. A. that action under the Wage and Hour Law might be heard in either a federal or a state court, it necessarily conferred jurisdiction upon the state court to hear such causes, regardless of whether the same be a penalty or not. Therefore, it is not necessary to determine whether a penalty is provided for in Section 216 in determining the jurisdiction of the Court. Congress had the authority to confer jurisdiction upon the state court in matters of this kind whether it be a penalty or not, and Congress has said that such jurisdiction is conferred, and therefore decisions dealing with the question of penalties in jurisdictional matters is merely dicta and not necessary to the decision of the questions involved.

See *Stringer* v. *Griffin Grocery Co.* (Tex.), 149 S. W. (2d) 158; *Adair* v. *Traco Division* (Ga.), 14 S. E. (2d) 466.

The question now before this Court is not whether or not the provisions of the Fair Labor Standards Act constitute a penalty in the sense that jurisdiction would be exclusive in the federal court but the question is whether it constitutes a penalty under Sec. 2301, Miss. 1930 Code. The precise question presented is the construction of Sec. 2301, Miss. 1930 Code.

The term "penalty" is a very elastic term and has been given various and sundry meaning, depending upon the sense in which the same has been used. The term "penalty" in some contexts has been defined or construed in the limited sense of "a punishment accruing to the state"; or in the slightly less limited sense of "an amount accruing

to an individual but being in reality a punishment by the government."

We respectfully submit that the Supreme Court of Mississippi in construing its own statute, Sec. 2301, has construed the word "penalty" in that statute as including "liability imposed by way of compensation as well as punishment," if the liability imposed as compensation to the individual is a fixed sum without reference to the damage actually inflicted by the commission of the wrong. While this Court in *Overnight Transportation Co.* v. *Missel*, 86 L. Ed. 1683, 316 U. S. 572, 62 S. Ct. 1216, interpreted the Fair Labor Standards Act as imposing a liability by way of compensation, rather than punishment by the government, this Court did not attempt there to construe the meaning of the word "penalty" in Sec. 2301, Miss. 1930 Code. We respectfully submit that the Supreme Court of the State of Mississippi has construed its statute and the word "penalty" therein as including such liability as is imposed by the Fair Labor Standards Act. That construction of Sec. 2301 by the Mississippi Supreme Court in *State* v. *Newton*, *supra*, would, we submit, be conclusive on this Court.

The Federal Courts will follow, in reality, as a part of state statutes, the decisions of the highest court of the State interpreting such statutes. In a very real sense the interpretation of a State statute by the highest court of that state becomes an integral part of the statute. Section 2301, Miss. 1930 Code, differently construed and imposed by the Supreme Court of Mississippi and this court might well become two statutes. Accordingly the general rule is well established that the federal courts feel bound by cases in the state court of last resort in construing the state statute. *Sim* v. *Edenborn*, 242 U. S. 131, 37 S. Ct. 36, 61 L. Ed. 199; *McGregor* v. *Hogan*, 263 U. S. 234, 44 S. Ct. 50, 68 L. Ed. 282; *Terrace* v. *Thompson*, 263 U. S. 197, 44 S. Ct. 15, 68

L. Ed. 255; *General Oil Co.* v. *Crain*, 209 U. S. 211, 28 S. Ct. 475, 52 L. Ed. 754; *Packing Co.* v. *Court of Industrial Relations*, 267 U. S. 552, 45 S. Ct. 441, 69 L. Ed. 785; *Kansas City etc. Co.* v. *Arkansas*, 269 U. S. 148, 46 S. Ct. 59, 70 L. Ed. 204.

Also, as a matter of fact, in an appeal to the Supreme Court of the United States from the Supreme Court of the State of Mississippi, if this Court should reverse the Supreme Court of Mississippi upon the federal question involved, namely the interpretation of the word "necessary" in the Fair Labor Standards Act as applying to the facts in this case, then this Court would remand the case to the Supreme Court of Mississippi for a determination of the state question: the interpretation of the word "penalty" in Section 2301, Miss. 1930 Code. It is thoroughly established that in the exercise of its appellate jurisdiction over the decisions of state courts, this Court will confine its review to the federal question and will not pass upon the non-federal question; but, if the judgment of the state court is reversed on the federal ground, it will remand the case to the state court for further proceedings and this Court will not interfere with such subsequent proceedings in the state court if a decision therein is not then based on federal grounds. *Snyder Granite Co.* v. *Gast Realty & Inv. Co.*, 245 U. S. 288, 38 S. Ct. 125, 62 L. Ed. 292; *Missouri, etc.* v. *Dockery*, 191 U. S. 165, 24 S. Ct. 53, 48 L. Ed. 133; *Railroad Co.* v. *White*, 238 U. S. 507, 35 S. Ct. 865, 59 L. Ed. 1433.

We, therefore, respectfully submit that should this Court determine that the Supreme Court of the State of Mississippi was in error in its interpretation of the Fair Labor Standards Act, that it will then reverse this cause and remand the same to the state court for a construction therein by the state court of the word "penalty" in Sec. 2301, Miss. 1930 Code, i. e., whether or not the word "penalty" therein is sufficiently broad to include the liability

imposed by the Fair Labor Standards Act even though it is imposed as compensation and not as a punishment by the government.

POINT C.

The petitioner here has no cause of action under the Fair Labor Standards Act of 1938, Title 29 U. S. C. A., Section 216(b), in that the employee involved is now deceased and the cause of action would not survive said employee.

The Federal Statute does not provide for Survival of suit under the Wage and Hour Law.

The cause of action sued on exists solely by virtue of the Federal statute, U. S. C. A. 29, Par. 216.

We, therefore, quote this Section in full:

"216. Penalties; civil and criminal liability.

"(a) Any person who willfully violates any of the provisions of section 215 shall upon conviction thereof be subject to a fine or not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

"(b) Any employer who violates the provisions of section 206 or section 207 of this chapter shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. *Action to recover such liability* may be maintained in any court of competent jurisdiction *by any one or more employees* for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the

plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. June 25, 1938, Ch. 676, 816, 52 Stat. 1069." (Italics ours.)

It will be noted that the above mentioned section nowhere provides for the survival of the cause of action after the employee's death. There is no other provision either of the Federal Wage and Hour Law or in any other Federal statute providing for the survival of this cause of action. There is no general Federal statute providing for survival of causes of action. Counsel for plaintiff has not insisted that the cause of action survive by virtue of either the Federal statute on Wage and Hours, and any other Federal statute.

Also, see 25 C. J., p. 220. The statute having expressly enumerated the persons who could "maintain" the cause of action created solely by an existence of the statute this enumeration would have the effect of preventing the maintenance of such a suit by anyone else. Such an action can be maintained only by an employee or his designated agent.

Assuming the Federal Statute to be silent as to survival, the Common Law as it existed at the time of its adoption in America would control.

Counsel for the plaintiff states the above mentioned rule in the following language:

> "The general rule is that a cause of action given by a federal statute, if no specific provision is made by act of Congress for its survival, survives or not according to the principles of the common law existing in England at the time of the formation of the Union."

We are inclined to agree with the foregoing statement of the rule.

However, in applying the rule, counsel for the plaintiff has overlooked the recent decision of *Erie* v. *Tompkins*,

304 U. S., p. 64, 82 L. Ed., p. 1188, in which Judge Brandeis says, "there is no federal general common law," and expressly overruled *Swift* v. *Tyson*, 16 Peters, p. 1, 10 L. Ed 856, and the cases following this.

The Mississippi statute with reference to survival in Sections 1712-14, Code of 1930, would have no application. This is correctly stated by counsel for the plaintiff who cites the case of *Schrieber* v. *Sharpless*, 28 L. Ed. 65. We have examined this case very carefully and find that it holds that the survival of the cause of action under the Federal statute depends upon the common law as of the formation of the Union, and that a statute on survival of actions subsequently adopted by one of the States has no application. Of course, the Mississippi statute was adopted to relieve parties from the rigor of the common law with respect to survival of causes of action, and the statute permits the survival of many causes of action that did not survive under the common law, as it existed at the time of the formation of the Union.

This Cause of action arises out of an alleged tort and is not a suit for breach of contract.

Plaintiff's counsel insists that the suit is for breach of a contract. The only authority cited in support of this view is the case of *Cole* v. *Harker* (W. D. Tenn.). Although this case is alleged to have been decided October 10, 1939, counsel states in his brief that it is "not yet reported". Since October 10, 1939, there have been approximately eleven columns of the Federal Supplement published, and if this case has not yet been reported, it is very unlikely that it ever will be reported. We also have made a careful search of the reported cases and are unable to locate whether this case has been reported, and naturally would be unable to comment upon what the case held on the soundness of the

reasoning supporting the same. At any rate, it was a decision of a "one man court" and evidently was not regarded as being of sufficient importance to justify it being incorporated in the reports.

In the case of *Terner* v. *Clickstein & Terner, Inc.*, 283 N. Y. 299, 28 N. E. 2d 846 (N. Y., 1940), the Appellate Court of the State of New York, in dealing with a suit under the Fair Labor Standards Act for additional wages and overtime, held that the jurisdiction was in a court of law and not equity, and that the nature of the action was that of a tort and not a breach of a contract, using the following language:

> "*The primary right arises from a tort and the right of action is not dependent upon any equitable feature or incident* (Pomeroy's Eq. Juris. (4th Ed.), p. 178). Under such conditions, an action in equity will not lie" (Italics ours).

The theory that the law becomes a part of the contract has been definitely discarded in the case of *St. John* v. *Brown* et al., (N. D. Texas, Fort Worth Division, March 28, 1941) 38 Fed. Supp. 385, wherein the following language was used:

> "Though this law was in effect, the employment contract was made without reference to it. * * * Here, extra pay for overtime is a thing the law demands. Whatever that per hour contractual rate is figured to be is the rate Congress had in mind when it said, 'not less than one and one-half times the *regular rate* at which he is employed.' *The law did not become a part of these contracts.* * * *. The law exacts certain things and forbids others, *and fixes civil and criminal penalties for its violation.* Even the 'one and one-half times' provision is akin to a penalty, intended to discourage overtime employment and to encourage a greater spread of employment. * * *" (Italics ours.)

Cause of Action Does Not Survive under Common Law.

Under the common law as it originally existed the general rule was that causes of action based upon a contract would survive, but that causes of action based upon a tort would not survive. In order to broaden this rule the statute of 4 Edward III, Chapter 7, was enacted. This statute and its effect is stated in the case of *Moore* v. *Backus*, 78 F. 2d 571 (572), in the following language:

> "For many centuries the maximum actio personalis moritur cum persona applied to all tort actions. In the fourteenth century, however, the English statute of 4 Edward III, Chapter 7, was enacted, which limited and became a part of the common law. That statute is the basis of this controversy and reads as follows:
>
> "'Whereas in times past executors have not had actions for the trespass done to their testators, as of the goods and chattels of the same testators carried away in their life, and so such trespasses have hitherto remained unpunished; it is enacted that the executors in such cases shall have an action against the trespassers to recover damages in like manner as they, whose executors they be, should have had if they were in life' (Quoted in Pollock on Torts (11th Ed.), p. 66)."

There was no other statute enacted in England relating to the subject of survival of causes of action prior to the formation of the American Union.

It will be noted that the foregoing statute was intended to apply primarily to suits for conversion of specific, tangible personal property wherein the estate of the decedent had been damaged and that of the defendant enriched.

The early decisions under the common law were thoroughly reviewed in the cause of *Sullivan* v. *Associated Bill*

Posters etc., 6 F. 2d 1000 (1004, 1007), in the following language:

> "It was a rule of the common law that most causes of action based on contract survived, while most of those founded on tort abated. But the rule was subject to various exceptions. The real test, so far as tort actions were concerned, seems to have been whether the injury on which the cause of action was based affected property rights, or affected the person alone. In the former case the cause of action survived, while in the latter it abated. See 21 Encyc. of Pl. & Pr. 31. The common-law rule, as laid down in 3 Blackstone's Comm. 302, is as follows:
>
> "* * * The death of either party is at once an abatement of the suit. And in actions merely personal, arising ex delicto (from wrong done), for wrongs actually done or committed by the defendant, as trespass, battery, and slander, the rule is that actio personalis moritur cum persona (a personal action dies with the person); and it shall never be revived either by or against the executors or other representatives. For neither the executors of the plaintiff have received, nor those of the defendant have committed, in their own personal capacity, any manner of wrong or injury.'
>
> "In Hambly v. Trott, Comp. 371, 376, which was decided in 1776, Lord Manfield, discussing the maxim above quoted, declared that it was not generally true and much less universally so. The question in that case was whether an action of trover could be maintained against an executor for a conversion by his testator. The case was twice argued before the Court, and at its conclusion it was said: 'Cur. advisari vult.' On a subsequent day Lord Mansfield delivered the unanimous opinion of the court, in which he said:
>
> "'Here therefore is a fundamental distinction. If it is a sort of injury by which the offender acquires no gain to himself at the expense of the sufferer as being

or imprisoning a man, etc., there the person injured has only a reparation for the delictum in damages to be assessed by a jury. But where, besides the crime, property is acquired which benefits the testator, there an action for the value of the property shall survive against the executor. As, for instance, the executor shall not be chargeable for the injury done by his testator in cutting down another man's trees, but for the benefit arising to his testator for the value of sale of the trees he shall. So far as the tort itself goes, an executor shall not be liable; and therefore, it is that all public and all private crimes die with the offender, and the executor is not chargeable; but, so far as the act of the offender is beneficial, his assets ought to be answerable, and his executor therefore shall be charged.'"

If "specific property" is acquired, the court held the cause of action survives; if otherwise, the court held that it does not.

In 1 C. J. 185, it is said:

> "In order that a right of action arising out of a tort should survive against the executor or administrator of the tort-feasor, it was generally held essential that the latter should, by the wrongful act, have acquired specific property by which, or by the proceeds of which, the assets in the hands of his peronal representatives were increased. It was not enough that the benefit resulted or that expense was saved to the tort feasor by which his estate was larger than it otherwise would have been."

In the case now before the court it does not appear that the deceased defendant has in his estate any of the plaintiff's property. Assuming as we must the allegations of the complaint to be true, they amount to a claim that the estate of the defendant has been increased by profits made by the defendants wrongfully diverted from the plaintiff. So far as the injury done to property is concerned,

it is indirect and consequential, and, the action being ex delicto, under the foregoing authorities it would not survive against the personal representatives. And even if it were shown that one's property was actually diminished, and not merely that he was prevented from increasing it by gains he otherwise would have made, the action would not survive. For the test of survivability does not turn on the fact that one's estate has been diminished. Thus in *Henshaw* v. *Miller*, 58 U. S. 214, 15 L. Ed. 222, it was held an action brought to recover damages for fraudulently recommending a third party as worthy of credit whereby financial loss resulted and one's estate was diminished did not survive, either at common law or under the statute of Virginia.

The entire theory of the Wagner Act prohibiting the issuance, except in certain instances, of injunctions in restraining orders by the Federal Court in labor disputes is based upon the theory that labor is not property and that a labor contract is not an article of commerce. As stated in the case of *Sullivan* v. *Associated Bill Posters, etc.*, 6 F. 2d 1000 (1012):

> "* * * they did not diminish the plaintiff's 'property' which was something already acquired. That which it hoped to acquire, but had not yet obtained, certainly did not constitute its 'property' within the meaning of the statute, and so did not survive."

Cause of action does not survive under Mississippi decisions.

We have heretofore called attention to the fact that the Mississippi statutes on this subject have no application. These statutes were passed to increase the kinds of action that would survive under the common law, and the fact that the statutes have no application militates against the theory

of survival instead of assisting it. Prior to the adoption of the statute causes for personal injury did not survive.

However, under the Mississippi decisions, special attention is called to the case of *McNeely* v. *City of Natchez*, 148 Miss. 268, 114 So. 484, holding that a cause of action for a penalty for failure to secure a franchise from the City of Natchez to operate a ferry did not survive; and the case of *Catchings* v. *Hartman*, 178 Miss. 672, 174 So. 553, holding that cause of action for libel and slander did not survive the death of the plaintiff.

The *McNeely* case very clearly holds that a cause of action for a penalty does not survive. In a subsequent division of this brief, we deal with the question of whether or not the alleged benefits constituted a penalty and will not attempt to go into that question at this time as it would constitute repetition.

The *McNeely* case and *Catchings* case are interesting only in that they indicate that the courts of this state have not been inclined to expand the common law on the subject of a survival of causes of actions. We quote from the case of *Catchings* v. *Hartman*, *supra*, as follows:

> "(1, 2) It is conceded, as it must be, that common law causes of action for slander or libel do not survive the death of either the wrongdoer or the person injured, wherefore, if they be any such survival, it must be by force of a sufficient statute. The question, therefore, is whether an action of slander is within the term 'personal action' as used in the above-quoted statute. In McNeely v. City of Natchez, 148 Miss. 268, 274, 114 So. 484, 487, it was held that this statute, being in derogation of the common law, must be strictly construed, and that the term 'personal action' must be interpreted according to its strictly technical meaning; and the court thereupon, so interpreting the meaning, held that a personal action, under the said statute, is one brought

for the recovery of personal property, for the enforcement of some contract or to recover damages for its breach, or for the recovery of damages for the commission of an injury to the person or property.'"

We respectfully submit that the judgment appealed from should be affirmed.

Respectfully submitted,

W. S. Henley,
Wm. H. Watkins, Sr.,
P. H. Eager, Jr.,
Mrs. Elizabeth Hulen,
Attorneys for Respondent.

Henley, Jones & Woodliff,
Hazlehurst, Mississippi;
Watkins & Eager,
Jackson, Mississippi;
Of Counsel for Respondent.